IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.30 OF 2003

Shri Nagbhushan Madhukar Jawalekar
age adult, Occ. Service
residing at B-202 Space Towers,
Mahatma Nagar, Opp. Water Tank,
Opp. Bhosala Military School,
Satpur Nashik 422 007 ... **Appellant**
(Orig. Respondent)

Versus

Mrs. Jyoti Nagbhushan Jawalekar
age adult, Occ. Service
residing at C/o.
Shri V.M. Laulkar,
7/15 Ambika Apartment Behind
Karve Road, Telephone Exchange,
Erandwane, Pune-411 004. ... **Respondent**
(Orig. Petitioner)

Adv. Smt. Geeta Mulekar for the Appellant
None for the Respondent

CORAM : S.B. MHASE,
& S.R. SATHE, JJ.
DATED : 23rd AUGUST, 2006

ORAL JUDGEMENT :-

1. Appellant husband, the Original Respondent in PA-355-2001 has preferred this appeal against the judgement and order passed by the Judge, Family Court, Pune whereby Petition filed by the Appellant's wife for restitution of conjugal rights under section 9 of Hindu

Marriage Act 1955 was decreed in favour of the Petitioner-wife and counterclaim filed by the Appellant-husband seeking divorce on the ground of desertion was dismissed. For the sake of convenience hereafter the parties shall be referred to as *'Appellant'* and *'Respondent'*.

2. The brief facts giving rise to this appeal are as under :-

The marriage between the Appellant and Respondent took place on 12/05/1982. It was arranged marriage. At the time of marriage, Respondent was M-Com and doing service, while, the Appellant-husband had studied upto D.M.E. and was serving at Mumbai. After marriage, for a period of first 7-8 months, the Appellant-husband used to come to Pune for weekend as his wife i.e. present Respondent was residing there. Thereafter, she got herself transferred to Mumbai.

3. According to Respondent-wife right from the first day of her marriage, her mother-in-law was not behaving properly with her. She had noticed that her husband was under the control of his mother. Even the Appellant-husband used to say that everything in their

house belongs to his mother and as such the Respondent had no alternative but to behave as per the say of her mother-in-law. It is the case of Respondent-wife that at times her husband had even beaten her. Even then, she pulled on with the Appellant-husband. Not only that but out of the said wedlock, they had first son Sangram who was born on 07/12/1983 at Pune. Even after the birth of Sangram, ill-treatment at the hands of mother-in-law continued. Thereafter, Appellant-husband was transferred from Mumbai to Nashik. The Respondent-wife also, therefore, sought transfer from Mumbai to Nashik.

4. The couple had a second son Sagar born on 29/07/1989 at Nashik. Even at the time when they were residing at Nashik, the Appellant-husband and his mother were not giving good treatment to Respondent. Around 05/07/1998, after consulting the husband i.e. Appellant, Respondent sought her transfer to Pune. According to her, at that time, her husband had told her that within two months, the children would shift to Pune and he would visit them on Saturdays and Sundays and due to the said assurance, she got her transfered from Nashik to Pune. However, when she actually started residing at Pune, she noticed that the Respondent

stopped having any contact with her. She made several phone calls to the Appellant but he never used to attend phone calls and used to ask the children to talk on phone. She, therefore, wrote a letter dated 09/02/1999 to her mother-in-law and explained the entire position. Not only that but according to her, on 10-12 times, she went to Nashik. But even at that time, no one used to talk with her and her husband i.e. Appellant used to sleep in his parents' bedroom. When she expressed that she would be staying with them in Nashik in Diwali, her husband i.e. Appellant flatly refused to do so. Not only that but on one occasion, when she had been to Nashik, her mother-in-law drove her out of the house. Even for meeting children, she was required to wait at the school of the children. On 01/08/2000, she wrote another letter to her husband and his mother and informed that in spite of their harassment, she would be staying with the husband and would forgive them as she has desire to lead happy married life. According to her, the husband, however, did not give any reply to the said letter whereby she had given proposal for resuming co-habitation. The Respondent-wife, therefore, felt that her husband hatched a plan whereby he managed to see that his wife

gets herself transferred to Pune so as to get rid of her. When she noticed that for a period of about 3 years i.e. from July-1998 to 2001, her husband was not responding, though she was ready and willing to co-habit with him, she filed Marriage Petition No.355 of 2001 for restitution of Conjugal Rights alleging that her husband without any reasonable excuse withdrew himself from her society.

5. The Appellant-husband filed Written Statement and admitted that the Respondent is his legal wedded wife and out of the said wedlock, they have two sons by name Sangram and Sagar. He also admitted that after marriage, Respondent-wife was transferred from Pune to Mumbai and thereafter, when he was transferred to Nashik after a period of about 3 months, she got herself transferred to Nashik. He denied all the allegations made by the wife regarding ill-treatment meted to her at his hands as well as at the hands of his mother. He on the contrary contended that Respondent-wife was in fact not behaving properly.

6. The Appellant-husband also contended that there was flat purchased at Nashik in the joint names of the

Appellant and Respondent. However, his wife suddenly sold the said flat at Nashik without consulting him and also took the entire consideration of the said sale transaction and got herself transferred to Pune at her own will. He also contended that neither he nor any of his family members had forbidden her from dwelling in her matrimonial home. According to him, the Respondent-wife was in fact reluctant to stay with him. Hence on all these grounds, he prayed for the dismissal of the Petition for restitution of conjugal rights filed by his wife and claimed that decree for divorce be passed.

7. On these pleadings, the learned Trial Judge framed issues at Exh-29. In order to prove her case, the wife examined herself at Exh-30 and produced certain letters on record. As against this, in order to prove his case, husband i.e. Appellant examined himself at Exh-35. After considering the entire evidence on record, the learned Trial Judge came to the conclusion that the wife has proved that the Appellant-husband has withdrawn himself from the company of Respondent-wife without any just and sufficient cause. He, therefore, passed decree for restitution of conjugal rights in favour of wife. He also held that the husband has failed to prove that the wife has deserted him for a

period of two years immediately preceding filing of the Petition/counterclaim. He, therefore, dismissed the husbands' claim regarding divorce.

8. In this appeal before us, Mrs. Mulekar learned Advocate for the Appellant-husband has urged two points. Firstly, she submitted that the learned Trial Judge has not properly appreciated the evidence on record and has wrongly held that the Respondent-wife had got herself transferred from Nashik to Pune after consulting her husband i.e. Appellant. She also canvassed before us that the learned Trial Judge failed to take into consideration the fact that though house at Nashik was standing in the joint names of Appellant and Respondent, the Respondent alone sold the same without consulting the Appellant-husband and left Nashik. Thus, according to her, the wife had in fact deserted the husband. Even after going to Pune, she never resumed co-habitation. She, therefore, submitted that decree for restitution of conjugal rights be set aside and decree for divorce be passed. Alternatively, she submitted that at least decree for judicial separation be passed as marriage between the Appellant and Respondent has already broken down.

9. It is an admitted fact that marriage between Appellant and Respondent took place on 12/05/1982 and out of the said wedlock, they have two children. First on 7/12/1983 and second on 29/07/1989. It is also not in dispute that at the time of marriage, Appellant-husband was serving at Mumbai and Respondent-wife was serving in State Bank of India, Pune. Admittedly, after period of about 7-8 months from the marriage, wife i.e. present Respondent got herself transferred to Mumbai. It is also not in dispute that after few years when Appellant-husband was transferred to Nashik, wife also got herself transferred to Nashik.

10. It is in fact not in dispute that in July-1998, Respondent-wife got herself transferred from Nashik to Pune. According to her, it is only after discussing the matter and consulting her husband, she sought the said transfer. According to her, the Appellant-husband had told her that within two months thereafter sons would also be shifted to Pune and the husband had in fact inclination to settle at Pune. However, it is the contention of the Appellant-husband that his wife had no desire to co-habit with him and on the contrary, she

wanted to live separately, hence, without consulting him she got herself transferred and even sold the house at Nashik which was in fact standing in the joint names of Appellants and Respondents and thus, she in fact deserted him.

11. The fate of this appeal depends on the question as to whether the version given by the Respondent-wife that she got herself transferred from Nashik to Pune after consulting her husband is true and correct or whether she on her own took the decision to have transfer at Pune with a view to reside separately and deserted the husband is true ?

12. As the wife has initially filed the Petition for restitution of conjugal rights, it is needless to say that initial burden of proving that her husband has without reasonable excuse withdrawn himself from her society lies on the wife. So, we have to find out from the material on record as to whether Respondent-wife has satisfactorily discharged the burden of prove.

13. At the outset, it must be mentioned that both the parties have made allegations against each other

but both of them have not adduced any specific evidence in that behalf. In fact, from the material on record it appears that even according to wife though she was ill-treated by her mother-in-law and at times by husband, she was actually co-habiting with her husband. Admittedly, out of the said wedlock they have two sons and all of them were residing together till May 1998. So we can not ignore the fact for a period of about 16 years, they had in fact lived together. The main dispute between them appeared to have arisen after the time, Respondent-wife got herself transferred from Nashik to Pune. In fact, all along she has stated that she sought such transfer only after consulting her husband. The learned Advocate for the Appellant-husband strenuously argued before us that this version can not be accepted because she herself had stated that in July-1998 after consulting her husband, she got herself transferred on 05/07/1998. So, within such short period, it is not possible to get such transfer and therefore it has to be presumed that wife must have decided long back to get herself transferred and must have taken necessary steps also. However, if we carefully read the evidence in this behalf, it appears that no specific cogent evidence is adduced which would

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positively establish that the idea of respondent-wife getting herself transferred to Pune was never under discussion between the said spouses. While considering this aspect, we can not ignore the fact that admittedly parents of both the parties are residing at Pune. So, naturally, both the spouses must have thought from children's education point of view that it is better if they can settle at Pune. So, merely because at some stage the wife has made stray statement that she consulted her husband and when he gave consent, she obtained the transfer. On 05/07/1998, we can not jump to the conclusion that her version is not true.

14. Much is made about the fact that the Respondent-wife sold the flat at Nashik without consulting appellant though the flat was standing in the joint names. However, while considering this aspect, it must be noted that it has come on record that the said flat was purchased by wife. The entire amount regarding the said flat was paid by her. However, even then she had agreed to join the name of her husband for the said flat but that by itself is not sufficient to hold that the husband was in fact having any ownership rights in the same. It has also came on

record that after sale of this flat, the wife has purchased some flat at Pune. So, merely because she sold the flat at Nashik one can not jump to the conclusion that she had no desire to keep relations with Respondent or with her children and had an intention to desert them. On the contrary, there is abundant evidence on record which clearly goes to show that even after the time she transferred from Nashik to Pune, she had intention to co-habit her husband.

15. The Respondent-wife has categorically stated that after the time she was transferred to Pune at least on 200 times she gave phone calls to her husband but there was no response from him but only children used to talk. It is pertinent to note that this statement of the wife is not shaken or shattered in the cross-examination. Instead of 200 times it may be some less but that matters very little. Fact remains that on several occasions, she had contacted her husband. So that itself shows that she had no intention to sever the relations.

16. It is an admitted fact that Respondent-wife had written letters dated 09/02/1999, 29/03/2000 and 09/06/2000, to her husband or mother-in-law. Besides

this, the Respondent-wife has also stated that she wrote a letter dated 01/08/2000 to her husband. It is pertinent to note that in his letter (Exh-36/6) dated 04/07/2000, the appellant has clearly admitted that he received her three letters dated 09/02/1999, 29/03/2000 and 09/06/2000. It is pertinent to note that in the letter dated 09/02/1999 written by Respondent-wife to her mother-in-law, (Exh-31/4) she had categorically stated that she sought the transfer and sold the house only after consulting her husband and she alone had never taken any such decision. Much is made about one statement in the said letter wherein she has said

> "माझी तब्येत व नोकरी दोन्हीही टिकावे यासाठी मी भूपणला विचारुनच हे निणर्य घेतलेले आहेत"
>
> (With a view to maintain my health as well as service, after consulting Bhushan time and again, I have taken this decision)

17. It was argued on behalf of the learned Advocate for the Appellant-husband that this statement shows that wife had no care and regard about others and she was interested only in her health and service. Firstly, it must be noted that we have to read the entire sentence as it is. Her health as well as her service

were certainly important not only for her but in fact for entire family. So in order to maintain the same if the spouses have taken any particular decision after consulting each other, there was nothing wrong. So the above mentioned sentence is certainly not of help to the Appellant-husband to prove his case.

18. It is pertinent to note that even in the letter dated 09/06/2000, the wife had written to Appellant-husband.

> "सुमारे 2-3 वर्षापूर्वी मी व तुम्ही दोघांनीही विचार करुन पुण्यामध्ये कायमस्वरुपी बि-हाड करण्याचे ठरविले, हेतू हाच की मुलांच्या शिक्षणाची कायम सोय होईल तसेच वादविवाद न होता आपल्याला सुखी संसार करता येईल तेव्हा तुमचे सांगण्यावरुन व तुमचे परवानगीने मी पुण्याला बदली करुन घेतली."
>
> (About 2-3 years back both of us after discussion decided to settle at Pune. That was only with an intention that there would be permanent arrangement for children's education and both of us can reside happy married life without dispute debate).

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19. Not only that but in that very letter, she has even mentioned that her husband had accompanied her to Bus stand and even helped her for packing the bags etc. It must be noted that if really the wife had left the house without any consultation of her husband then certainly after receipt of this letter, he would not have kept mum. In fact, if she had left the house without his consent, the Appellant-husband would have immediately written to her as to how she left the house all of a sudden and got herself transferred. But admittedly, the husband had not done so. Not only that but even in his letter dated 04/07/2000 (Exh-31/6) he has only vaguely stated that contents of her letters are false. We can not ignore the fact that specific averments with regard to discussion etc. made by wife in her letters are not at all refuted by him in his letter. So, this conduct of the Appellant-husband also goes to show that his version that his wife got herself transferred without consulting him is not true and correct. Considering the preponderance of probabilities also the version of the Respondent-wife appears to be true and correct and so we are inclined to believe her version that she got herself transferred only after consulting her husband.

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20. The Appellant-husband has claimed divorce by filing counter-claim to the Petition filed by his wife for restitution of conjugal rights. If we carefully read entire Written Statement, then it is very clear that the husband has not at all specifically stated that he is seeking divorce on particular ground. However, it has been argued that divorce is claimed on the ground of desertion because on 05/07/1998, wife got herself transferred and left the house. Question arises, whether this conduct of the Respondent-wife establishes that she deserted the husband. If we read the provisions of section 13(1)(ib) and in particular, the second explanation of the said provision then we find that the meaning of desertion is explained in the same. It says:

> Explanation :- In this sub-section the expression 'desertion' means the desertion of the Petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the Petitioner by the other party to the marriage, and its

grammatical variations and cognate expressions shall be construed accordingly.

21. It is well settled that in order to prove the desertion the party alleging the same must prove that other party has an intention to sever the relations or to put an end to co-habitation. So, there must be animus *deserendi*. At the cost of repetition, it must be mentioned that in the instant case, wife has in fact left Nashik and got herself transferred to Pune after consulting her husband. So, her conduct of leaving Nashik can not be considered to be an act of desertion. What is more to be noted is that even after going to Pune on several occasions she had given phone calls to Appellant-husband. Not only that but she had herself gone to Nashik. She has categorically stated that even at that time, she was not allowed to enter the house. What this does show. It clearly indicates that the Appellant-husband had in fact no intention to co-habit with his wife. The above mentioned four letters written by the wife to appellant-husband clearly indicate that though there was some harassment and ill-treatment to her at the hands of Appellant and his mother-in-law, still she had never thought of deserting

the husband. In fact, we do find that she continued to stay in the house for a period of about 16 years. Even in the above mentioned letters also she had stated that in spite of all such unhappy incidents she would like to continue to stay with the husband and children. She had also expressed that if any mistake was committed by her. Then her husband's mother-in-law should pardon her. But we find that in spite of this, the husband and his mother did not even allow the Respondent-wife to enter the house and to keep relations with them. Then, it must also be noted that there are several admissions given by the Appellant-husband in his cross-examination which clearly establish that he had no intention to co-habit with his wife and he in fact wanted to withdraw himself from the society of Respondent. In cross-examination, he has stated :

> “it is true that I severed the relations with Petitioner since 05/07/1998.
>
> I was not desiring on 05/07/1998 that she should reside with me, since that day I do not want to stay with the Petitioner.
>
> I had asked her not to come to the

house when she used to visit Nashik to see the children. Last time also I did not allow her in the house when she had come to Nashik. I am not ready to co-habit with the Petitioner. Though she is ready."

These above mentioned admissions clearly give death blow to entire version of the Appellant-husband.

22. It must be noted that in the instant case, we find that earlier on two occasions, the Respondent-wife got herself transferred and posted at a place where her husband was posted. So, that conduct in fact shows that it was her intention to reside with the husband and adjust herself. So, on this background also it is very difficult to accept the version of the Appellant-husband that she on her own took the decision to take transfer from Nashik to Pune. If really she had an intention to go to Pune with a view to abandon Appellant-husband, then certainly there was no reasons for her to give several phone calls to husband after reaching to Pune or even to got to Nashik on several occasions and writ above mentioned letters. So, taking into consideration all the facts and circumstances of the case and preponderance of probabilities we have

absolutely no hesitation to hold that the Petitioner has proved that the Appellant-husband withdrew himself from her society without there being any reasonable excuse and the husband has utterly failed to establish that his wife deserted him.

23. Thus, we have no hesitation to hold that the judgement and order passed by the learned Trial Judge is legal and correct. There is no necessity to interfere with the same.

24. Hence order passed by the learned Judge, Family Court, Pune in Family Court Petition No.355 of 2001 is confirmed.

25. The Appeal is dismissed with costs.

(S.R. SATHE, J.) ***(S.B. MHASE, J.)***

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